AMGENERAL INSURANCE BHD v. SHARUL AHMAD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ROSILAH YOP J
[SUIT NO: 22NCVC-24-01-2014]
28 NOVEMBER 2014

INSURANCE: *Motor insurance – Insurer's liability to satisfy judgment – Accident occurred in Singapore – Passenger suffered injuries and damages – Suit against driver filed in Singapore – Whether passenger covered under insurance policy – Agreement – Construction of – Whether insurer liable to satisfy judgment obtained by passenger – Whether insurer entitled to indemnity – Pacific & Orient Insurance Co Bhd v. Motor Insurers' Bureau of Singapore*

CIVIL PROCEDURE: *Documents – Agreed bundle – Authenticity and truth of contents in documents – Whether agreed by parties – Whether documents admitted as evidence*

The plaintiff, a Malaysian insurance company, provided insurance cover ('the policy') to the first defendant in respect of his car. The first defendant, however, did not procure the policy cover for passengers in the car. On 13 December 2010, the first defendant lent his car to the second defendant and the latter drove the said vehicle in Singapore with his wife ('Zuraini') as a passenger. Unfortunately, the car was involved in a road traffic accident and as a result, Zuraini suffered from injuries, losses and damages. Zuraini then commenced an action in the High Court of Singapore against the second defendant. Initially, the plaintiff appointed a Singapore firm, Global Law Alliance ('GLA') to represent the second defendant in the said suit and thereafter, decided not to defend the suit *vide* GLA since the policy did not cover Zuraini as a passenger. The present suit was then filed by the plaintiff seeking several declarations, *ie*, (i) that the plaintiff was not liable to satisfy any judgment obtained by Zuraini in the Singapore suit against the second defendant; (ii) that the plaintiff was not legally liable under the policy of insurance for the injuries, losses and damages suffered by Zuraini; (iii) that the second defendant was in fundamental breach of the contract of insurance; and (iv) that the plaintiff was entitled to an indemnity from the first and/or second defendant if it was held directly or indirectly liable to satisfy the judgment obtained by Zuraini. The second defendant argued that he was not a party to the policy entered into between the plaintiff and the first defendant. During the pre-trial case management, both parties agreed that the special agreement (together with its annexure), the circulars issued by Persatuan Insuran Am Malaysia and the members' circular be categorised as Part A documents, *ie*, where the documents and its contents would be admitted as evidence.

Held (dismissing plaintiff's claim with costs)

(1) It is trite that the documents in Part A could not be disputed as to their contents and authenticity. On the facts, the agreed documents showed that the Malaysian insurer was bound by the laws in Singapore to meet the passenger's liability claim. The plaintiff admitted not only to the authenticity but also to the truth of the contents in the agreed documents. The evidence from the agreed documents was further corroborated by the policy issued by the plaintiff. Hence, the plaintiff's contention that failure to comply with the agreed documents would not have any effect on the rights and obligations of the parties under the insurance contract was an afterthought. (paras 29, 31, 37, 41 & 42)

(2) The special agreement stipulated that the plaintiff was liable to satisfy the judgment obtained by the passenger in Singapore, *ie*, Zuraini, even though the policy did not cover passenger liability. Further, the plaintiff's conduct in appointing a solicitor to defend the second defendant had waived its rights to deny liability on the policy. The plaintiff was thus liable to satisfy any judgment for damages or part thereof obtained by Zuraini in the Singapore suit against the second defendant. The second defendant was not in breach of the contract of insurance represented by the policy and the plaintiff was not entitled to an indemnity from the second defendant. The plaintiff was thus estopped from maintaining this action (*Pacific & Orient Insurance Co Bhd v. Motor Insurers' Bureau of Singapore*; refd). (paras 39, 47, 50 & 51)

Case(s) referred to:

Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Maimunah Hassan & Anor v. Marimuthu Samanathan & Anor [1993] 1 CLJ 119 HC ***(refd)***

Pacific and Orient Insurance Co Bhd (formerly known as Pacific & Orient Insurance Co Sdn Bhd) v. Motor Insurer's Bureau of Singapore [2013] 1 SLR 341 ***(refd)***

Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300 SC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 34 r. 2

Motor Vehicles (Third Party Risks and Compensation) Act [Sing], ss. 3, 5(1)

For the plaintiffs – Rueben (Lim Qi Si with him); M/s TH Liew & Partners

For the 2nd defendant – William Lim Wee Chong (Johnson Lim Fung Tat and Wajdi Mohamad with him); M/s Wajdi Shamsul & Co

Reported by Kumitha Abd Majid

JUDGMENT

Rosilah Yop J:

The Claim

[1] The plaintiff's claims against the second defendant are as follows:

(a) A declaration that the plaintiff is not liable to satisfy any judgment or part thereof obtained by Zuraini binti Mohamed in the Singapore suit against the second defendant;

(b) A declaration that the plaintiff is not legally liable under the policy of insurance CVP-V3697164-33 for motorcar no. WTG 4225 to the first defendant and/or the second defendant, for the injuries, loss and damages suffered by one Zuraini binti Mohamed, who was carried as a passenger in the said car on 13 December 2010 and which car was involved in an accident in Singapore on that date;

(c) A declaration that the second defendant was in fundamental breach of the contract of insurance represented by the policy and that there was therefore no policy cover for the benefit of the second defendant for the accident;

(d) A declaration that if the plaintiff is held directly or indirectly liable to satisfy any judgment or part thereof obtained by Zuraini binti Mohamed against the second defendant in the Singapore suit, the plaintiff is entitled to an indemnity from the first and/or second defendant;

(e) Costs.

Summary of the Plaintiff's Case

[2] The plaintiff is a company incorporated in Malaysia and engaged in business as general insurance and a significant portfolio of the plaintiff's insurance business is motor insurance business.

[3] The first defendant was at all material time the owner of motorcar no. WTG 4225. The second defendant is the person the first defendant lent the car to, on 13 December 2010 to enable him ('the second defendant') to drive into Singapore with his wife Zuraini binti Mohamed ('Zuraini') as a passenger.

[4] The plaintiff provided insurance cover *vide* motor insurance no. CVP-V3697164-33 ('the policy') to the first defendant in respect of the use of the car on the terms and conditions set out in the policy for the period 26 November 2010 to 25 November 2011.

[5] The insurance cover extended to use of the car in Singapore. The policy expressly excluded liability for third party claims from passengers carried in the car. The first defendant did not procure the policy cover for passengers carried in the car.

[6] Under s. 5(1) of the Singapore Motor Vehicles (Third Party Risks and Compensation) Act, ('the Singapore Act') it is compulsory that third party insurance coverage extends to include any claimants travelling as passengers or the insured vehicle.

[7] It is a criminal offence, if the car was driven into Singapore without the insurance coverage for the passenger pursuant to s. 3 of the Singapore Act.

[8] On or about 13 December 2010, the first defendant lent the car to the second defendant. The second defendant drove into Singapore with his wife as a passenger. Notwithstanding that the second defendant's wife, Zuraini, did not have insurance cover as required under the Singapore Act.

[9] On 13 December 2010, when the second defendant was driving the car in Singapore with his wife, Zuraini as a passenger, the car was involved in a road traffic accident. Zuraini suffered injuries, loss and damages as a result.

[10] On 31 January 2013, Zuraini instituted an action in the High Court of Singapore against the second defendant, in Suit No: 90 of 2013 ('Singapore suit').

[11] The plaintiff initially defended the second defendant in the Singapore suit to ensure that no default judgments are entered. The plaintiff is however unable to continue doing so because the policy did not cover the passenger.

[12] The plaintiff informed the second defendant through the plaintiff's Singapore Solicitors, Global Law Alliance, LLC ('GLA') by a letter dated 27 September 2013 that the policy did not cover him with the claim by his wife, Zuraini, in the Singapore suit.

Summary Of The Second Defendant's Case

[13] The second defendant asserts that this plaintiff's action against the second defendant is clearly misconceived, without basis, constitute an abuse of the court process and/or is bound to fail, for, *inter alia*, the following reasons:

(a) Global Law Alliance LLC ('GLA') was appointed by the plaintiff to represent the second defendant in the Singapore suit. In this regard, when GLA represented the second defendant in the Singapore suit in early 2013, neither the plaintiff nor GLA qualified that the same is "on a without prejudice and without admission of liability and without waiver of rights basis" ('the said qualifications'). Indeed, it was only in or around the end of September 2013, some nine months later, that the plaintiff and/or GLA started raising the said qualifications for the very first time. This sudden and/or last minute change of position by the plaintiff and/or GLA smacks of bad faith, after thought and/or an

attempt to circumvent/defeat the decision in the Singapore suit, and has severely prejudiced the second defendant's position in the Singapore suit.

(b) The plaintiff, as a Malaysian insurance company, has an obligation to satisfy a judgment obtained by the second defendant's wife in Singapore, even if the first defendant's insurance policy ('policy') does not cover passengers' liability. In this respect, even the plaintiff's own private car policy, provides as follows:

> Your rights or that of any other person to recover indemnity by virtue of the legislation or agreement executed between the Minister of Transport for the Government of Malaysia and the Motor Insurers' Bureau of West Malaysia on 30 March 1992 or the agreement executed between the Government of Singapore and the Motor Insurers' Bureau of Singapore on February 22, 1975 *shall not be affected in any way*.

(c) In addition, the Court of Singapore has also taken position consistent with para. (b) above.

(d) The second defendant did not commit any criminal offences in Singapore. In this regard, Malaysian registered vehicles are not required to comply and/or are exempted from complying with the requirements of Singaporean insurance policies, by virtue of the Singaporean Motor Vehicles (Third-Party Risks and Compensation) (Exemption) Notification. It is therefore baseless and wrong for the plaintiff to file this action against the second defendant.

(e) The Malaysian Court is not the proper forum or jurisdiction to try the plaintiff's claim since the accident occurred in Singapore. Further, any decision by this Honourable Court could potentially give rise to conflicts of law, in view of the decisions of the Singapore Court. Indeed, Kurnia Insurance (Malaysia) Berhad (now known as AmGeneral Insurance Berhad, the plaintiff), was a party referred to in one of the said decisions of the Singapore Court.

[14] On 13 December 2010 the first defendant lent the car to the second defendant and that the second defendant drove the car to Singapore with his wife, Zuraini, as a passenger. The second defendant further states that he is the authorised driver of the car.

[15] The second defendant is not a party to the policy signed between the plaintiff and the first defendant.

[16] The second defendant was not aware that the policy issued by the plaintiff to the first defendant does not cover passenger liability. In fact, the second defendant was told, amongst others, that the car has a comprehensive

policy cover and is fit in every aspect to travel to Singapore. The second defendant states that the relevant members' circular issued by General Insurance Association of Malaysia's Members also provide that:

> ... if a Malaysian insured vehicle is driven in Singapore and meets with an accident and a passenger in the vehicle is injured, the Malaysian insurer is bound by the laws in Singapore to meet the passenger liability claim notwithstanding the lack of premiums for passenger liability cover.

[17] The plaintiff owes a duty of utmost good faith to the second defendant to defend the second defendant in the Singapore suit and to satisfy any judgment obtained by the second defendant's wife in Singapore.

[18] The second defendant was named the second defendant in the Singapore suit and the driver of vehicle no. WB 5718Y, Ng Kar Sze was the first defendant in the Singapore suit.

[19] The plaintiff is not entitled to the relief as prayed for in this action and in the alternative, the second defendant states, *inter alia*, that the policy does not allow the plaintiff to seek for any indemnity from the second defendant.

Analysis Of Evidence And Findings Of The Court

[20] The plaintiff obtained judgment in default against the first defendant on 28 March 2014. As of today, the first defendant did not appeal or apply to set aside the said default judgment.

[21] From the pleading filed, I conclude that issues to be tried are as follows:

(i) Whether the plaintiff is legally liable under the policy to the second defendant, for the injuries, loss and damages suffered by Zuraini binti Mohamed, a passenger in the car which was involved in an accident in Singapore on 13 December 2010.

(ii) Whether the plaintiff is liable to satisfy any judgment obtained by Zuraini binti Mohamed in Singapore suit against the second defendant.

(iii) Whether the plaintiff is entitled to an indemnity from the second defendant.

[22] The plaintiff submits that the plaintiff is not liable under the policy as a matter of construction. The Motor Insurers' Bureau ('MIB') arrangements are irrelevant with regard to the plaintiff and second defendant.

[23] The plaintiff further submits that Persatuan Insuran Am Malaysia's ('PIAM') views have no legal effect with regard to the plaintiff and the second defendant. The second defendant did not know that the policy did not extend to passengers is untenable. The plaintiff also submits that the plaintiff is not estopped from maintaining this action and the second defendant's continuing duty of utmost good faith. Hence, the plaintiff is entitled to the remedies sought.

[24] The defendant submits that the plaintiff is not entitled to any of the declarations prayed. A

[25] The defendant further submits, based on the PIAM's members' circular no. 46 of 1994, special agreement (together with all its annextures, including the domestic agreement) and Singapore High Court Case, *Pacific and Orient Insurance Co Bhd (formerly known as Pacific & Orient Insurance Co Sdn Bhd) v. Motor Insurer's Bureau of Singapore* [2013] ISLR 341, the plaintiff is liable to satisfy the judgment that may be obtained by Zuraini binti Mohamed in Singapore suit notwithstanding the lack of premiums for passenger liability cover. The defendant submits that the second defendant is not a party to the policy entered into between the plaintiff and the first defendant. Accordingly, the second defendant could not fundamentally breach the contract represented by the policy. B C

[26] The plaintiff is therefore not entitled to any indemnity from the second defendant.

D

[27] Before I consider any other issues in this action, it is important for me to consider first on the admissibility of documents presented in this proceeding. The documents which are in dispute between the two parties, *inter alia*, are the special agreement (together with its annextures) dated 26 October 1987, and the three circulars issued by PIAM (principle officers' circular no. 187 of 1991 dated 2 September 1991, members' circular no. 46 of 1994 dated 17 February 1994 and members' circular no. 28 of 2005 dated 27 January 2005) (hereinafter will be called "the agreed documents"). E

[28] At the pre-trial case management date pursuant to O. 34 r. 2 of the Rules of Court 2012, both learned counsel had agreed that these agreed documents are to be categorized as a part A documents meaning that these documents and its contents are to be admitted as evidence. F

[29] It is trite that documents in part A cannot be disputed as to their content and authenticity.

G

[30] The evidentiary value of the agreed documents in part A of the common bundle filed herein was considered in *Jaafar Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509, Gopal Sri Ram JCA said at p. 531:

> Having considered the arguments of counsel on both sides and the authorities cited by them, I am of opinion that the following propositions may be taken as well-settled: H
>
> (1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon the terms of the agreement between the solicitors having conduct of an action. If by their agreement they dispense with formal proof and also agree to the truth of the contents of a particular I

document, then its contents may be relied upon either side to establish or to disprove a fact in issue. On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used. See, *Yew Lean Finance Development (M) Sdn Bhd v. Tan Gin Thong* [1985] CLJ 826 (Rep); [1985] 1 CLJ 299.

(2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. See, *Henry Trading Co Ltd v. Harun* [1966] 1 LNS 65; *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 1 LNS 5.

[31] By admitting these agreed documents as part A documents, the plaintiff had admitted not only to their authenticity but also to the truth of the contents.

[32] In *Maimunah Hassan & Anor v. Marimuthu Samanathan & Anor* [1993] 1 CLJ 119 the court held that it was unethical and unfair for counsel for the defendant to resile from an agreement made at the trial to admit certain documents as evidence and was therefore refused.

[33] Similarly, in *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300 where the Supreme Court held that an agreement at the trial by counsel as to maker and content of medical report was binding on counsel as he should not be allowed to resile from it.

[34] The plaintiff submitted that the three PIAM circulars have no force of law. They are no more than guidelines or recommendations which insurers are advised to take into account.

[35] Plaintiff further submitted that failure to comply with the PIAM circulars will not have any effect on the rights and obligations of the parties under the insurance contract.

[36] Learned counsel for the plaintiff further submitted that the special agreement relating to the application of the MIB arrangements does not apply to the second defendant.

[37] The plaintiff has admitted as to the authenticity and truth of the content of the agreed documents, it is inexplicable, in my opinion, that the plaintiff still insisted that failure to comply with the agreed documents will not have any effect on the rights and obligations of the parties under the insurance contract. In the circumstances, based on the authorities cited, I hold that the plaintiff's contention on this issue is an afterthought. I opined that the agreed documents are documents agreed upon by the plaintiff as to its authenticity and content and therefore admitted as evidence.

[38] The contents of the three circulars issued by PIAM were agreed upon by the plaintiff, *inter alia*:

Principal officers' circular no. 187 of 1991, *inter alia*, provide that:

1. Members would be aware that the Government of the Republic of Singapore has introduced the compulsory passenger liability cover effective 1 March 1981 through an amendment to the Motor Vehicles (Third Party Risks and Compensation) Act (chapter 88 of the Revised Edition) (Republic of Singapore).

4. Insurers cannot repudiate the passenger liability claim by virtue of a non-extension of passenger liability cover in heir insured's policy.

5. To ensure that policyholders are made aware of the compulsory passenger liability cover required in Singapore, it is recommended that a warning notice printed in red be inserted at the top portion of the proposal form and policy of insurance with immediate effect.

Members' circular no. 46 of 1994, provides:

> ... Problems have arisen when vehicles insured in West Malaysia travel into Singapore and meet with accidents causing death/injuries to passengers in their vehicles. These passengers go to the courts in Singapore and are awarded compensation. However, there have been instances where the Malaysian insurers have refused to pay the compensation or entertain the claim on the grounds that their policy does not cover passenger liability ...
>
> We wish to clarify the position adopted by the Motor Insurers' Bureau of West Malaysia and Motor Insurers' Bureau of Singapore in relation to the above mentioned situation.
>
> 1. When the MIB of West Malaysia was set up in 1968, Singapore insurers were asked to enter into a special agreement with our bureau. Similarly, when the MIB of Singapore was set-up in 1975 a similar special agreement was executed by the Malaysian insurers.
>
> 2. By signing this special agreement, Malaysian insurers are contracting unconditionally with the Singapore Bureau to be treated in every respect as an insurer and have expressly and unequivocally accepted all liabilities that can be levied on a Singapore insurer, including passenger risk ...
>
> 3. We enclose a copy of the special agreement which is signed between MIB of Singapore and all Malaysian insurers together with a copy of the domestic agreement which is referred to in cl. 2 of the special agreement as "the memorandum of agreement".
>
> 4. When these two documents are read together it is clear that, in the situation described in the second paragraph of this circular, the Malaysian insurer concerned is liable to *meet the claim* for recovery by MIB of Singapore ...

A

> 5. It is to be noted that the liability of the Malaysian insurer is not pursuant to the statutes but purely contractual, ie, *via* the special agreement and domestic agreement ...
>
> Members are requested to take note that it is the view of booth the Singapore and West Malaysia Bureaus that the Malaysian insurers who
B have contracted with MIB of Singapore and *vice versa* will have to meet their contractial obligations accordingly.

Members' circular no. 28 of 2005, says:

> ... if a Malaysian insured vehicle is driven in Singapore and meets with an accident and a passenger in the vehicle is injured, *the Malaysian insurer*
C *is bound by the laws in Singapore to meet the passenger liability claim notwithstanding the lack of premiums for passenger liability cover.*

[39] The special agreement (together with all its annextures, including the domestic agreement) stipulates that the plaintiff is liable to satisfy the judgment obtained by the passenger in Singapore (in this case, Zuraini) even
D though the policy does not cover passenger liability. In particular, cl. 3(1) of the domestic agreement (bundle B p. 26), which are annexed to and adopted by the special agreement, provides that:

> 3.(1) If a judgment is obtained in Singapore against any person (hereinafter referred to as the "judgment debtor") in respect of liability
E required to be insured by the compulsory insurance legislation the insurer concerned will satisfy the original judgment creditor if and to the extent that the judgment has not been satisfied by the judgment debtor within 28 days from the date upon which the person in whose favour it was given is entitled to enforce it.

F **[40]** The definition of "insurer concerned" is defined in cl. 1 (bundle B p. 25) as it includes the insurer or insurance company that issued the insurance policy expressly or by implication excludes the insurer's liability whether generally or in the particular circumstances in which the judgment debtor's liability was incurred.

G **[41]** Given the above, the agreed documents clearly show that the Malaysian insurer is bound by the laws in Singapore to meet the passenger liability claim notwithstanding the lack of premiums for passenger liability cover.

H **[42]** Indeed, the evidence from the agreed documents is further corroborated by the policy issued by the plaintiff.

[43] The provision in cl. I for the title "Avoidance Of Certain Terms And Rights Of Recovery" (bundle B p. 191) states as follows:

> 1. Your rights or that of any other person to recover indemnity by
I virtue of the legislation or agreement executed between the Minister of Transport for the Government of Malaysia and the Motor Insurers'

> Bureau of Malaysia on March 30, 1992 or the agreement executed between the Government of Singapore on February 22, 1975 shall not be affected in any way.

[44] Similar facts and issues involving a Malaysian insurance company and a Malaysian passenger without proper coverage have already been decided by the Singapore High Court in *Pacific & Orient Insurance Co Bhd (formerly known as Pacific & Orient Insurance Co Sdn Bhd) v. Motor Insurers' Bureau of Singapore* [2013] 1 SLR 341 which decides as a true and proper construction of principal agreement, the special agreement including the domestic agreement held that:

> ... if a driver of a Malaysian registered motor vehicle insured by P & O Insurance was involved in an accident in Singapore, and personal injury was caused to a passenger of the said vehicle, liability for such personal injury being excluded or not covered by the terms of P & O Insurance's policy of motor insurance, and judgment was obtained in Singapore by the said passenger against the said driver ..., then P & O Insurance was obliged to satisfy the said judgment by the said passenger ...

[45] The Singapore High Court decision in *Pacific & Orient Insurance Co Bhd* (*supra*) was upheld by the Singapore Court of Appeal which confirms that a Malaysian insurance company is liable to satisfy the judgment obtained by a passenger of Malaysian registered vehicle for accident occurred in Singapore; even though the motor insurance policy therein does not cover passenger liability.

[46] The plaintiff has also assumed the liability against the second defendant to satisfy any judgment that may be entered by Zuraini binti Mohamed in Singapore suit.

[47] It is clear by the conduct of the plaintiff having appointed solicitor to defend the second defendant vigorously, has waived its right to deny liability on the policy.

[48] The plaintiff has appointed GLA to represent the second defendant in the Singapore suit as early as 2013, even though the plaintiff was well aware that the policy does not cover passenger liability.

[49] GLA has taken various steps in defending second defendant in the Singapore suit including entering memorandum of appearance, taking instructions from the second defendant, filing the statement of defence, writing to other solicitors in the Singapore suit and liaising with the second defendant on the conduct of the Singapore suit.

[50] It is clear that by the conduct of the plaintiff has waived its right to deny liability on the policy. I am of the view that the plaintiff is estopped from maintaining this action.

[51] Based on the above I opined that the plaintiff is liable to satisfy any judgment for damages or part thereof obtained by Zuraini binti Mohamed in the Singapore suit against the second defendant, the plaintiff is legally liable under the policy of insurance CVP-V3697164-33 for Motorcar No. WTG 4225 to the second defendant as the authorised driver of the said car, the second defendant was not in breach of the contract of insurance represented by the policy and the plaintiff is not entitled to an indemnity from the second defendant.

[52] Hence the plaintiff's claim is dismissed with costs of RM40,000.